

1 Mark G. Worischek/Bar No. 011147
2 J. Adam Tate /Bar No. 029084
3 **SANDERS & PARKS, P.C.**
4 3030 North Third Street, Suite 1300
5 Phoenix, AZ 85012-3099

6 Firm E-mail: Minutes@SandersParks.com

7 Mark G. Worischek
8 Direct Phone: 602.532.5795
9 Direct Fax: 602.230.5054
10 Mark.Worischek@sandersparks.com

11 J. Adam Tate
12 Direct Phone: 602.532.5615
13 Direct Fax: 602.230.5015
14 Adam.Tate@sandersparks.com

15 *Attorneys for Plaintiff Great American*
16 *Alliance Insurance Company*

17 **UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 Great American Alliance Insurance
20 Company,

21 Plaintiff,

22 v.

23 Mark C. Williams and 6950 West Bell Road,
24 LLC,

25 Defendants.

Case No.: _____

**COMPLAINT FOR DECLARATORY
JUDGMENT**

26 Plaintiff Great American Alliance Insurance Company (“Great American”), for its
Complaint for Declaratory Judgment, alleges as follows:

JURISDICTION AND VENUE

1. Great American brings this declaratory judgment action pursuant to Rule 57 of the
Federal Rules of Civil Procedure and 28 U.S.C. Section 2201 for a declaration of rights of the
parties under an insurance policy that Great American issued to Defendants.

The Policy

11. The Policy insured the Defendants' interest in the Property against direct physical loss or damage subject to all terms, conditions, limitations, and exclusions set forth in the Policy. The Policy states:

1
2 A. *Coverage*

3 *We will pay for direct physical loss of or damage to covered*
4 *property at the premises described in the Declarations caused by*
5 *or resulting from any Covered Cause of Loss.*

6 12. The Policy also contains the following exclusions:

7 B. *Exclusions*

8 2. *We will not pay for loss or damage caused by or resulting from*
9 *any of the following...*

10 d. (1) *wear and tear;*

11 (2) *rust or other corrosion, decay, deterioration, hidden or*
12 *latent defect or any quality in property that causes it to*
13 *damage or destroy itself;*

14 ...

15 (4) *settling, cracking, shrinking or expansion;*

16 (5) *nesting or infestation, or discharge or release of waste*
17 *products or secretions, by insects, birds, rodents or*
18 *other animals...*

19 *But if an excluded cause of loss that is listed in 2.d.(1) through (7)*
20 *results in a "specified cause of loss" or building glass breakage,*
21 *we will pay for the loss or damage caused by that "specified cause*
22 *of loss" or building glass breakage.*

23 3. *We will not pay for loss or damage caused by or resulting from*
24 *any of the following, 3.a. through 3.c. But if an excluded cause*
25 *of loss that is listed in 3.a. through 3.c. results in a Covered*
26 *Cause of Loss, we will pay for the loss or damage caused by*
that Covered Cause of Loss.

c. *Faulty, inadequate or defective: ... (2) design, specifications,*
workmanship, repair, construction, renovation,
remodeling, ... (3) materials used in repair, construction,
renovation or remodeling, or (4) maintenance; of part or all
of any property on or off the described premises.

1 13. The Policy contains the following provision for resolution of disagreements
2 concerning the amount of loss:

3 2. *Appraisal*

4 *If we and you disagree on the value of the property or the*
5 *amount of loss, either may make written demand for an*
6 *appraisal of the loss. In this event, each party will select a*
7 *competent and impartial appraiser. The two appraisers will*
8 *select an umpire. If they cannot agree, either may request that*
9 *selection be made by a judge of a court having jurisdiction.*
10 *The appraisers will state separately the value of the property*
11 *and amount of loss. If they fail to agree, they will submit their*
12 *differences to the umpire. A decision agreed to by any two will*
13 *be binding. Each party will:*

14 *a. Pay its chosen appraiser; and*

15 *b. Bear the other expenses of the appraisal and umpire*
16 *equally.*

17 *If there is an appraisal, we will still retain our right to deny the*
18 *claim.*

19 **The Claim**

20 14. On or around May 5, 2011, Williams notified Great American of hail damage to the
21 Property reportedly caused by an October 5, 2010 hail storm.

22 15. Great American investigated the claim, which included an inspection of the Property
23 in June 2011, and consultation with Williams' preferred HVAC contractor, AZTECH Mechanical,
24 and a roofing consultant, David Price of White Guard Roof Coatings & Waterproofing.

25 16. Evidence of hail-related damage was found on certain rooftop air conditioning units,
26 certain parapet walls, and on certain unprotected built-up areas around the air conditioning units.
Hail-related damage was not found on the main roof.

 17. Williams' preferred HVAC contractor, AZTECH Mechanical, determined that hail-
related damage to all but 2 of the 25 rooftop air conditioning units could be repaired by combing
the condenser fins. The other two air conditioning units sustained greater damage that required

1 replacement. Based on these findings, on or about June 28, 2011, Great American issued an actual
2 cash value (“ACV”) payment to Williams of \$19,968.46 for damage to the air conditioning units,
3 parapet walls, and built-up areas around the air conditioning units. Williams accepted this
4 payment but did not perform the recommended scope of repairs to the air conditioning units.

5 18. On January 3, 2012, Great American issued an additional payment to Williams for
6 recoverable depreciation in the amount of \$2,646.16, which Williams accepted, and the claim was
7 closed.

8 19. Williams did not contest Great American’s adjustment of the loss or payments made
9 by Great American, nor did he seek additional payments under the Policy for hail-related damage
10 in 2012, 2013, 2014, or 2015.

11 20. The claim was re-opened over four years later in June 2016 when Williams
12 contacted Great American and reported finding additional hail damage to the property.

13 21. Upon re-opening the claim, Great American retained additional consultants who
14 inspected the Property and found evidence of limited hail damage to certain elevations of the
15 stucco exterior. On December 7, 2016, Great American issued to Williams an additional payment
16 of \$60,662.20 for repairs that included patching limited damage to certain elevations of the stucco
17 exterior. Williams accepted this payment.

18 22. Great American also commissioned laboratory testing by Roof Technical Services,
19 Inc., which confirmed Great American’s previous determination that the main roof of the Property
20 did not sustain any hail damage.

21 23. On February 15, 2017, Williams’ public adjuster, James O’Toole of The O’Toole
22 Company, sent Great American a \$1,423,062.04 repair estimate that included costs for, among
23 other things, replacement of the entire roof and complete replacement of 21 rooftop air
24 conditioning units.

25 24. Following receipt of the O’Toole Company estimate, Great American retained
26 HVAC Investigators (HVACi) to perform a comprehensive inspection and diagnostic testing of

1 the rooftop air conditioning units. HVACi issued a report dated April 4, 2017 finding that all hail-
2 related damage to the air conditioning units could be repaired for a total cost of \$24,535.55. Based
3 on these findings, Great American issued a final ACV payment of \$33,623.94 to Williams on June
4 23, 2017. Williams accepted this payment.

5 25. To date, Great American has made \$116,901.00 in undisputed ACV payments
6 related to Defendants' hail damage claim for damage to the rooftop air conditioning units; parapet
7 walls and built up areas around the air conditioning units; stucco; and store front signage.

8 26. To date, Defendants have not submitted to Great American any evidence of hail-
9 related damage to the main roof of the Property.

10 **The Appraisal Demand**

11 27. On July 12, 2017, Great American received a written demand for appraisal from
12 Williams' public adjuster, James O'Toole, requesting appraisal regarding (1) damage to the
13 rooftop air conditioning units and (2) claimed damage to the roof of the Property.

14 28. Mr. O'Toole designated Brian Molineaux as Defendants' appraiser. Great
15 American designated Kurt Grosz as its appraiser, and the appraisers jointly agreed that Judge
16 Edward Burke would serve as umpire.

17 29. Following an inspection of the property with roofing consultant David Hill of
18 Premier Roofing & Waterproofing, both appraisers acknowledged that there was no hail damage
19 to the roof of the Property, and that the appraisal would therefore be limited to the amount of loss
20 for the rooftop air conditioning units only. This is consistent with the prior findings of Roof
21 Technical Services, Inc., which confirmed through laboratory testing that the roof was not
22 damaged by hail.

23 30. Subsequent to the appraisers' acknowledgment that there was no hail damage to the
24 roof, Mr. O'Toole advised Great American that Defendants' designated appraiser, Brian
25
26

1 Molineaux, was being replaced by a new appraiser, Jason Rohde, who is Mr. O'Toole's son-in-
2 law.

3 31. Defendants' replacement appraiser, Jason Rohde, rejected the appraisers' prior
4 agreement that the scope of the appraisal was limited to the amount of loss to the rooftop air
5 conditioning units.

6 32. On December 18, 2017, Great American's designated appraiser, Mr. Grosz,
7 provided Mr. Rohde with a copy of the Premier Roofing & Waterproofing report finding no hail
8 damage to the roof. Following this communication, Mr. Grosz did not receive communication
9 from Mr. Rohde until over six months later on June 21, 2018 when Mr. Rohde wrote Mr. Grosz
10 and requested that they proceed to involve the umpire in the appraisal.

11 33. On June 21, 2018, Mr. Rohde provided Mr. Grosz with his appraisal position,
12 consisting of a \$1,423,062.04 repair estimate. The estimate that Mr. Rohde provided mirrors the
13 estimate provided by Mr. O'Toole in 2017, and includes costs for replacement of all the rooftop
14 air conditioning units and replacement of the entire roof.

15 34. Despite the insured's demand for appraisal of only the roof and the air conditioning
16 units, Mr. Rohde's estimate included costs for repairs to various other parts of the Property,
17 including the stone veneer, stucco EIFS system, and asphalt parking lot.

18 35. Beyond submitting an estimate from Defendants' public adjuster, Mr. Rohde
19 submitted no photographs, expert reports, or any evidence of hail damage to the main roof of the
20 Property.

21 36. On August 2, 2018, Great American sent a letter to Williams and O'Toole rejecting
22 Defendants' appraisal demand with respect to alleged damage to the roof based on Great
23 American's determination that the roof of the Property did not sustain damage covered under the
24 Policy. The letter indicated that Great American was prepared to proceed with the appraisal of
25 the rooftop air conditioning units only.

- 1 C. That Great American is entitled to recover from Defendants its costs and attorneys'
2 fees incurred in bringing this action pursuant to A.R.S. Sections 12-341 and 12-
3 341.01; and
4 D. That Great American be awarded such other relief as the Court deems appropriate.

5 **RESPECTFULLY SUBMITTED** this 14th day of August, 2018.

6
7 **SANDERS & PARKS, P.C.**

8
9 By 
10 Mark G. Worischeck
11 J. Adam Tate
12 3030 North Third Street, Suite 1300
13 Phoenix, AZ 85012-3099
14 *Attorneys for Plaintiff Great American*
15 *Alliance Insurance Company*
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing thereby transmitting a Notice of Electronic Filing to all CM/ECF registrants.

By: Shannon M. Berry